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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 551 ...

FETZER TELEVISION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JUDGMENT OF CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14,418

FETZER TELEVISION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BEFORE: MILLER, Chief Judge, McALLISTER and WEICK, Circuit Judges.

The above cause coming on to be heard upon the record, the briefs of the parties, and the argument of counsel in open court, and it appearing that petitioner objects to the enforcement of the order of the National Labor Relations Board on the ground that it is not supported by substantial evidence on the record as a whole, and that the order of the Board is invalid because it is too broad; and the court being duly advised,

Now, therefore, it is ADJUDGED and DECREED that the Board's order was sustained by the evidence on the record as a whole; that the order was invalid and proper under the circumstances of this case; and it is further decreed that the petition of the Board for enforcement of its order be and is hereby granted.

APPROVED FOR ENTRY:

Thomas F. McAllister,
United States Circuit Judge.

A True Copy

Attest:

Carl W. Reuss,
Clerk.
By Mary M. McAfee,
Deputy Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. .....

FETZER TELEVISION, INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

FETZER TELEVISION, INC., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on October 12, 1961.

OPINIONS BELOW

The Opinion of the Circuit Court of Appeals for the Sixth Circuit is set forth in the certified record on Petition for Writ of Certiorari under title "PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT." (NLRB Order is at 70a and 121a).

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on October 12, 1961, and jurisdiction of this Court is invoked under 28 *U. S. C. A.* §1254 (1). Order Staying Mandate was issued October 27, 1961, granting a stay of 30 days, subject to further order of the court. Jurisdiction of Circuit Court of Appeals was in accordance with 29 *U. S. C. A.* §160 (f).

QUESTIONS PRESENTED

(1) Where evidence of alleged unfair labor practices occurring within the six months limitation period provided by Sec. 10 (b) of the NLRB Act is not substantial and is not supported by substantial evidence on the record as a whole, may such practices and the charges based thereon be "bolstered" or established by prior time-barred events, antedating the limitation period fixed by the Statute, and may such time-barred events be admitted as evidence of alleged union "hostility"?

Circuit Court of Appeals — Yes.
Petitioner — No.

(2) Does the formal withdrawal of unfair labor practice charges made with the consent of the Regional Director of the NLRB, following investigation by the Board, bar further proceedings before the Board as to such charges, and bar the admission in evidence in a subsequent case of acts upon which the withdrawn charges were based?

Circuit Court of Appeals — No.
Petitioner — Yes.

(3) Where there is no substantial evidence based upon the record as a whole showing need or justification for a broad restrictive order, is the Labor Board order too broad, which: (a) Enjoins discouraging membership in or activities on behalf of the charging Union, "or any other labor organization," and enjoins against "or in any manner" discriminating against employees; (b) En-

joins against threats of discharge or reprisals if employees join or assist the above named labor organization "or any other labor organization," or select such labor organization as the bargaining representative; and (c) Enjoins against "in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Sec. 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Sec. 8 (a) (c) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959?

Circuit Court of Appeals – No.
Petitioner — Yes.

(4) Is the expression of opinion by supervisors privileged under 29 *U. S. C. A.* §158 (c) of the Act?

Circuit Court of Appeals — No.
Petitioner — Yes.

(5) Whether substantial evidence based upon the record as a whole, supports the findings and conclusion of the NLRB that the employer discriminatorily changed working conditions of the employee Stone by means of reduction of maintenance work?

Circuit Court of Appeals — Yes.
Petitioner — No.

STATUTES INVOLVED

Sec. 10 (b) NLRB Act — 29 *U. S. C. A.* §160 (b):

> "• • • Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, • • •."

29 *U. S. C. A.* §160 (f):

> "* * * the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

29 *U. S. C. A.* §158 (c):

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Regulations of NLRB re Withdrawal — Par. 115.09 (Series 8):

> "Who may file; withdrawal and dismissal. — A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to Sec. 102.45, upon motion, with the consent of the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to Sec. 102.45, upon motion, with the consent of the Board. *Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the trial examiner designated to conduct the hearing, or the Board.*" (Italics ours).

STATEMENT

Petitioner, FETZER TELEVISION, INC., purchased Television Station WWTV at Cadillac, Michigan, in September, 1958. Upon petition of the union of National Association of Broadcast Employees and Technicians (AFL-

CIO) (hereinafter called the Union), the NLRB held a representation election on October 23, 1959, which the Union won by a vote of 11 to 4 (73a). Following the election the Union filed unfair labor practice charges against the Company and General Counsel issued a complaint on January 14, 1960, charging various acts of coercion and interference by the employer.

Claimed acts of coercion are based upon certain conversations between employees and supervisors occurring for the most part prior to the election which was won by the Union. On August 14, 1959, the date of the NLRB hearing on the Union's petition for a representation election, the Union stated it wished to call one of petitioner's employees as a witness. As an accommodation to the Union, a supervisor offered to, and did, telephone the desired employee (Dawn Peckham, nee Kennedy) and requested that she come to the hearing as a witness for the Union. Subsequent stipulation by the parties at the hearing made such appearance unnecessary and the supervisor again telephoned the employee, telling her that now it was not necessary to appear. When the supervisor returned to the Company following the hearing, this employee inquired "what all the trouble was about," and the supervisor replied "it was mostly caused by Quintan Dailey * * * a trouble maker * * * always trying to get the Union in, and that if he (Dailey) wasn't such a good engineer * * * he would have been discharged long ago." Subsequent unfair labor practice charges were filed against the Company on September 10, 1959 (7 C. A. 2511), charging interference, restraint and coercion of employees by the Petitioner through threats, interrogation and discrimination against this particular employee whom the supervisor had telephoned. Following investigation by the NLRB those charges were formally withdrawn on November 5, 1959 (40a).

Approximately two months later, and about two weeks prior to the representation election, one of the employees in the bargaining unit tried to get a newly appointed supervisor to express his opinion as to unions. This supervisor was not only newly appointed, but he exercised no supervisory authority over either the questioning employee, or any other employees, within the bargaining unit. When this

supervisor came into a room where the employee was working alone, the employee began his conversation by asking the supervisor about unions (43a), and then asked what the new supervisor thought about the coming election. The new supervisor said "Gene (the general manager) wasn't going to stand for — that he wouldn't monkey around with the guys this time like he did a year ago; that he'd — well, as Paul put it, chop-chop; we'd be going down the old country road" (43a). The employee admitted that this form of expression and speech vernacular was a very frequent and favorite figure of speech of this newly appointed supervisor. This statement was clearly an expression of personal opinion privileged by the Act — 29 *U. S. C. A.* §158 (c) —

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Coupled with these incidents, the trial examiner admitted into evidence, and the United States Circuit Court of Appeals condoned, the use of testimony of an event which occurred more than six months prior to the unfair labor practice charges in the instant case.

Over objection, testimony was admitted of remarks of a supervisor made more than six months prior to the filing of the charges to the effect that there was "one rat" who invited the union in, and that the supervisor would get rid of him in time.

It is the position of the Petitioner that where the evidence of alleged unfair labor practices marshalled from within the six month period is not substantial, and is not supported by substantial evidence on the record as a whole, that the allegations in the complaint cannot be established by reliance on the time-barred events preceding the six months period prior to the filing of the charges in the instant case. Despite the six month statute, 29 *U. S. C. A.* §160 (b) — Sec. 10 (b) of the Act — as to use of time-barred events, the Board by use of time-barred evidence

to "bolster" a finding of union animosity found, and the Circuit Court of Appeals sustained a finding, that Petitioner had threatened its employees and had discriminatorily changed the duties of employee Gordon Stone. The Board thereby based its findings of threats of reprisal and interference on time-barred evidence contrary to decisions of this Court and the Statute.

Employee Stone was removed from camera work effective with Monday, October 26, 1959. This change he protested, but the trial examiner found that the change resulted from Petitioner's properly adopted policy of using engineers instead of untrained personnel to operate camera for television broadcasting, for reasons of efficiency and in keeping with policy of Petitioner's other affiliated stations (91a). Thereafter during the week of October 26, through October 30, employee Stone completed the cutting of a doorway through a cement block wall at the transmitter building (25a), and on October 30, by memorandum, he was notified that the Company was making changes in its engineering department, and changes which would affect Stone, and that Stone was to be responsible only for the proper clean-up, waxing, etc. of the transmitter building in its entirety. At this time Stone was still protesting his removal from camera, and it is now claimed that this memorandum discriminatorily reduced Stone's building maintenance work.

This finding is in direct contradiction to the testimony of the general manager that Stone's duties had not been changed; Stone's own testimony that he did building maintenance work only when there was such work which needed to be done, and that no building maintenance work of any substantial proportion was ever done without express approval at any time, and that after the issuance of the memorandum Stone worked a full 40 hours on the doorway — by request cut a ventilator opening — and was assisting in maintenance work in the roof when he was injured in January, 1960. These facts, coupled with the significant fact that no other maintenance work was performed at the transmitter building by any other person from time of the receipt of the memorandum by Stone to the time of his disablement. We, therefore, say that there is no substantial evidence based upon the record as a whole that Stone's maintenance duties were discriminatorily reduced or actually reduced in any way.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Petitioner is now subject to the broad sweeping injunctive terms of an all inclusive order of the NLRB, which is subject to immediate enforcement action by contempt proceedings in the Circuit Court of Appeals. Because of the threat of contempt action, Petitioner seeks review for the reasons herein set forth.

(1) Without the "bolstering" effect of time-barred evidence, there is no justification for entry of any order against Petitioner, let alone the broad sweeping blanket order to which Petitioner is now subject. In the case of *International Machinists vs. NLRB*, 362 U. S. 411, this Court ruled that Sec. 10 (b) of the National Labor Relations Act was a rule of evidence, and that the policy of the six month limitation section of the Act was to bar litigation over past events and to stabilize existing bargaining relationships. In that case, this Court touched on but refused to pass directly on the problem here presented by this case, namely, that if the evidence within the permissible period is not substantial, may the merit of the allegations in the complaint be shown by reliance on earlier events otherwise barred by the six month limitation period of the Statute.

In the case here before the Court the isolated statements of the two supervisors, which occurred within the permissible period were made in response to inquiries by employees under different and entirely separate circumstances, and if not exempt as statements of opinion, do not amount to substantial evidence of unfair labor practices. Without the effect of time-barred conversation of May 12, 1959, occurring prior to the six month limitation period, there is no substantial evidence based on the record as a whole of any unfair labor practice on the part of Petitioner. The clear acceptance and "bolstering" effect of the time-barred evidence "as evidence of union animus" results in making the findings of unfair labor practices dependent upon time-barred events, although those events themselves cannot be the subject of a complaint. By using this time-barred evidence to determine the claimed union hostility of Petitioner, the Board has no trouble thereafter of finding Petitioner guilty of the acts charged. This is contrary

to the intended scope of *Local 1424 International Machinists vs. NLRB*, 362 U. S. 411.

(2) An important question properly raised before the trial examiner, the Board, and the Circuit Court of Appeals, was whether or not the Board was foreclosed from considering the evidence of acts which occurred prior to the withdrawal of prior unfair labor practice charges. In a prior case No. 7 C.A. 2511, the Petitioner was charged with interference, restraint and coercion of its employees through threats, interrogation and alleged discrimination against employee Dawn Kennedy Peckham, with whom a supervisor had a conversation at the request of the Union, on the day of the representation hearing, in which the supervisor is alleged to have said that "Quintan Dailey was a trouble maker, and if he was not such a good engineer he would have been discharged long ago."

During the hearing in the case here before the Court, counsel for the General Counsel introduced evidence relating to the charges in the previously withdrawn complaint. Objection was overruled and the evidence received. We believe the policy of the Act, as well as general common law rules raise an equitable estoppel against such past charges and require that if a charge is formally dismissed with the consent of the Regional Director of the NLRB following investigation of the facts, that thereafter the Board and the General Counsel should be precluded from offering or considering evidence of acts on which the withdrawn charges were based. The regulations of the Board provide that withdrawal of such charges may only be made with the consent of the Regional Director, Trial Examiner, or the Board, and that "upon withdrawal of any charge, any complaint based thereon shall be dismissed by the Regional Director issuing the complaint, the Trial examiner designated to conduct the hearing, or the Board" (Par. 1115.09, Sec. 102.8 Regulations, Series 8). While we say that the withdrawal of these charges concedes there was no substantial evidence that petitioner, through its supervisors, had threatened or interfered with the rights of the employees Kennedy or Dailey, or any other employees, we also say that such withdrawal bars further proceedings or evidence before the Board as to such charges, and bars the admission in evidence of acts upon which such charges

were based. No other ruling is possible if the promotion of "industrial peace" is the policy and purpose of the Act.

International Machinists vs. NLRB, 326 U. S. 411.

Promotion and stabilization of industrial peace truly requires that withdrawal of the charge shall once and for all end all proceedings thereon. Any other rule means withdrawal is conditional only, not absolute.

(3) The broad unlimited order of the Board, as affirmed by the Circuit Court of Appeals, enjoins Petitioner from, "in any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Sec. 7 of the Act." The Petitioner is also effectively enjoined, "from in any other manner discriminating against any other labor organization," even though there is no testimony that any other Union is involved. As this Court has pointed out in *NLRB vs. Express Pub. Co.*, 312 U. S. 426, 85 L. ed. 930 (reaffirmed in *Communication Workers of America vs. NLRB*, 326 U. S. 479), a Board order implemented by an enforcement order of the Circuit Court of Appeals, constitutes an injunction, and real and affirmative reasons — not possibilities — must be present in order to warrant broad injunctive relief.

The Board has no authority to restrain generally all other undefined unlawful practices, which it has neither found to have been pursued, nor positively found to be related to the proven unlawful conduct.

Communication Workers of America vs. NLRB, 362 U. S. 479, 4 L. ed. 2d 896.

Because of the broad scope of this order, the Petitioner can unwittingly find itself suddenly involved in contempt proceedings based upon acts entirely removed or unrelated to the conduct which the Board originally found Petitioner to have committed. This is a penalty that is not justified by the acts which Petitioner allegedly committed. As Courts have had occasion to point out, the Board has repeatedly found it proper to take a single offense as establishing a "generalized scheme" (*Communication Workers vs. NLRB*, supra), "proclivity" (*McComb vs. Jackson-*

ville Paper Co., supra, "pattern" (*NLRB vs. Brewery and Beer Distributor Drivers*, 3 Cir. 1960, F. 2d — (40 L.C. par. 66,752)) and thereby claim justification necessary to warrant wholesale blanket relief.

Such action, in our opinion, effectively overrules *NLRB vs. Express Publishing Co.*, 312 U. S. 426, 85 L. ed. 930. Relief granted to the Board in the form of an order must be supported by justification based upon fact, and by necessity appearing from the record itself. The substantial evidence in this case, based upon the record as a whole, fails to show either justification or necessity for an order of unlimited blanket scope. The whole purpose of the order as drafted is the *in terrorem* effect of making available to the Board the ready avenue of contempt proceedings. This result we do not believe to be compatible with the purposes of the National Labor Relations Act or compatible with the announced promotion of industrial peace as announced in this Court in *Local 1424 International Machinists vs. NLRB*, supra.

(4) 29 *U. S. C. A.* Sec. 158 (c) provides that the expressing of any views, argument or opinion, or the dissemination thereof, shall not constitute or *be evidence* of an unfair labor practice, if such expression contains no threat or reprisal, force or benefit. Yet, notwithstanding the statutory language the Board, as affirmed by the Circuit Court of Appeals, has admitted in evidence statements of opinions by Supervisors which contain no threat of discharge, promise of benefit, or threat of force. These statements are the August 14, 1959 statements of supervisor Wheeler to employee Kennedy and the conversations in October before the election between employee Arrington and supervisor Hill. "Bolstering" these privileged expressions of opinion by events which occurred more than six months prior to the filing of the charges here involved, the Board found evidence of union hostility on the part of the Employer, and by so finding concludes that the privileged statements of opinion constituted unfair labor practices and that the Petitioner had discriminatorily changed the working conditions of employee Stone because of his union activities. Such findings are not supported by substantial evidence on the record as a whole and constitute a denial to the Petitioner of its statutory rights which permit the ex-

pression of opinion and which bar evidence of acts occurring more than six months prior to the date of the filing of charges here involved, contrary to Sec. 10 (b) of the Act (29 *U. S. C. A.* §160 (b)).

(5) Notwithstanding the fact that employee Stone was hired primarily to do janitor work, plus some camera work and in his words "any building repair that needed being done" (17a), and although the record was clear that building maintenance work had always been subject to direct approval and order at the time of performance of the work and was not personally performed by the employee on his own initiative (63a), the Board found that Petitioner had deliberately and intentionally removed employee Stone from performing any maintenance work, because of Stone's connection with the Union. Evidence by Petitioner showed that Stone was regarded as a competent building repair man, that he was assigned to at least three projects of so-called building maintenance on and after the alleged discriminatory removal from maintenance work; that no other building maintenance work of any kind was performed by anyone else at Petitioner's building after the alleged removal of Stone from such work, and that there were no building maintenance projects actually scheduled to be commenced. We believe the finding of the Board in regard to Stone is not supported by substantial evidence on the record as a whole and is based upon claimed hostility of petitioner toward the Union, established as we have pointed out, by the time-barred evidence improperly introduced.

RELIEF PRAYED

We ask that this Court review the Judgment by writ of certiorari, and pray that the findings of the Board, as affirmed by the Circuit Court of Appeals, be set aside and the order of the Board finding that Petitioner has violated

the Act be reversed and the complaints heretofore issued be dismissed in their entirety.

Respectfully submitted,
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DATED: November 3, 1961.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 551

FETZER TELEVISION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals enforcing the Board's order (Pet. 1) is reported at 295 F. 2d 244.[1] The Board's decision and order (P.A. 121a–125a, 70a–102a) [2] are reported at 129 NLRB 660.

[1] There is a typographical error in the order as reprinted in the petition (Pet. 1). The phrase "the order was invalid and proper" should read "the order was valid and proper."

[2] "P.A." and "B.A." refer to portions of the record printed as appendices to the briefs filed by petitioner and the Board in the court of appeals. References preceding a colon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1961 (Pet. 1). The petition for a writ of certiorari was filed on November 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence on the record considered as a whole supports the Board's findings that respondent threatened employees with economic reprisal for engaging in union activities and discriminated against an employee because of his union activities.

2. Whether, on the facts of this case, the Board's order was unduly broad.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth *infra*, pp. 13–14.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *Hostility of petitioner to the Union and threats to employees of loss of benefits and jobs for Union adherence.*—During 1958 and 1959, the National Association of Broadcast Employees and Technicians, AFL–CIO, conducted a campaign to organize employees of station WWTV, which petitioner operated (P.A. 72a–73a, 78a; 29a–31a). On May 12, 1959, Richard Wheeler, the operations manager of petitioner's station, told Arthur Runyon, a cameraman, that he understood that there was a "Union man" in

town and asked if Runyon had been approached regarding Union activities by the Union representative or by any of petitioner's engineers (P.A. 78a; 29a–30a, B.A. 9b–10b). Runyon replied that he had not (P.A. 78; 30a). Wheeler then stated that there was "one rat" who had invited the Union's representative to organize petitioner's employees and threatened "we'll find out who this troublemaker is and we'll get rid of him in time" (P.A. 78a; 31a).[3]

On July 21, 1959, the Union filed a petition with the Board's Regional Office, seeking a representation election among certain of petitioner's employees (P.A. 73a; 46a–47a, 143a–147a, B.A. 4b). A hearing was conducted on August 14 (P.A. 79a; 69a, B.A. 6b). On the day of the hearing, employee Dawn Kennedy received two phone calls from Operations Manager Wheeler, one telling her to come to the hearing and the other cancelling the request (P.A. 79a; 37a–38a, 69a). When Kennedy later asked Wheeler what the "trouble" had been, the latter replied that "it was mostly caused by Quintan Daily," an engineer employed by petitioner (P.A. 79a; 38a, B.A. 16b). Wheeler then described Daily as a "troublemaker * * * always trying to get the Union in" (P.A. 79a; 38a). Wheeler added that "if he [Daily] wasn't such a good engineer * * * he would have been discharged long ago" (P.A. 79a; 38a).

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[3] Runyon testified without contradiction concerning his conversation with Wheeler. Since the incident occurred seven days outside the six-month limitation period contained in Section 10(b) of the Act, the Board, although using it as background evidence, did not base any unfair labor practice finding upon it (P.A. 78a, 85a).

Pursuant to a decision and direction of election issued by the Board on September 30, 1959, an election among petitioner's employees was scheduled for October 23 (P.A. 72a–73a). About two weeks before the election, Supervisor Paul Hill spoke about unions to employee Jack Arrington (P.A. 80a; 42a–43a). During this conversation, Hill told Arrington that petitioner's vice president and general manager, Eugene Ellerman, "wasn't going to stand for—that he wouldn't monkey around with the guys this time like he did a year ago; that he'd—well * * * chop-chop, we'd be going down the old country road" (P.A. 80a; 43a).

The Union won the election on October 23 (P.A. 73a; 17a, 14b–15b). A short time later, Supervisor Hill was asked by employee John Jacobson why office personnel and salesmen were learning to operate the station transmitter. Hill replied that, with the Union in the station, petitioner wanted to be prepared in case of a strike (P.A. 80a; 33a, 35a–36a). Hill added, "There's going to be a lot of dead flies swept away" (P.A. 80a; 36a).[4]

2. *Discrimination against employee Stone.*—Gordon Stone began working for station WWTV in April 1957 as a janitor and building maintenance man, and also performed some cameraman duties for part of the period he worked for petitioner (P.A. 85a; 15a, 16a). His janitorial and maintenance duties included

[4] Jacobson's testimony concerning his conversation with Hill was uncontradicted. Although the General Counsel did not allege that the incident constituted a separate unfair labor practice, it was found by the Board to constitute further evidence of petitioner's hostility to the Union (P.A. 80a, 85a).

general cleanup of the transmitter building, studio, film room, offices, and "any building repair that needed being done" (P.A. 85a; 17a). His maintenance responsibilities included, among other things, in the fall of 1959, the installation of a doorway through a cement-block wall (P.A. 86a; 18a).

Stone was president of the Union's local at station WWTV. On October 23, 1959, he acted as the Union's official observer at the Board election (P.A. 86a; B.A. 7b). On October 30, Stone received a memorandum from Ronald Baker, petitioner's chief engineer and Stone's immediate supervisor (P.A. 75a, 86a; 18a, B.A. 5b, 19b), which stated that Baker was (P.A. 86a–87a; B.A. 18b):

> * * * making several changes effective November 1st next, that will affect you. As of the aforementioned date, * * * [you will] be responsible only for the proper cleanup waxing, etc. of the transmitter building in its entirety * * *.

The memorandum was intended, according to Baker, to confine Stone to "normal maintenance," including, waxing and "routine preventative building maintenance" such as touching up the paint on trim around a doorway or replacing a washer in a leaky faucet, but excluding projects "of major proportions" such as knocking a hole through a wall, putting in a new window, or painting the transmitter or the studio (P.A. 93a–94a; 61a–62a).

Upon receiving the memorandum, Stone abandoned a painting job, which he had only partially completed

(P.A. 88a, 94a; 20a–21a). Thereafter, Stone averaged about 25 to 30 hours per week, instead of the approximately 35 hours per week which he had previously spent on maintenance and janitorial work (P.A. 86a, 88a; 17a, 21a). Since Stone was paid on an hourly basis, his income was reduced accordingly (P.A. 85a; 16a).

B. THE BOARD'S DECISION AND ORDER

The Board found, in agreement with the Trial Examiner, that Wheeler's remark to Kennedy on August 14, 1959, that Quintan Daily "would have been discharged long ago" if Daily "wasn't such a good engineer" constituted a threat of economic reprisal against Union adherents in view of Wheeler's preceding remark that Daily was a "trouble maker * * * aways trying to get the Union in" (P.A. 79a, 121a–122a). The Board also found that Supervisor Hill's pre-election remark to employee Jack Arrington that General Manager Ellerman "wouldn't monkey around with the guys this time * * * chop-chop, we'd be going down the old country road" constituted a threat of economic reprisal for union activities (P.A. 80a). Accordingly, the Board concluded that respondent violated Section 8(a)(1) of the Act by the foregoing threats to Wheeler and Hill.

The Board further found that the detrimental change in Stone's work a week after the election won by the Union was discriminatorily motivated and hence violative of Section 8(a) (3) and (1) of the Act. In so finding, the Board relied upon the timing

of the change, petitioner's hostility to the Union,[5] petitioner's knowledge of Stone's adherence to the Union, and its failure to explain the change (P.A. 94a).

The Board concluded that the unlawful acts engaged in by petitioner "indicate a basic opposition to the purposes of the Act, and therefore danger exists that [petitioner] may in the future commit other unrelated unfair labor practices" (P.A. 98a–99a). Accordingly, the Board's order required petitioner to cease and desist from threatening employees with discharge, or otherwise discriminating against them because of their membership or activities on behalf of "National Association of Broadcast Employees and Technicians (AFL–CIO), or any other labor organization," and from "in any other manner" interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act. Affirmatively, the Board ordered petitioner to revoke its October 30, 1959, memorandum insofar as it relieved Stone of maintenance duties previously performed by him; to offer him reinstatement to such duties and to make him whole for any loss in pay suffered as a result of the discrimination against him; and to post appropriate notices (P.A. 122a–123a).

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[5] The Board found that petitioner's "animosity" to the Union was demonstrated by the threats of economic reprisal found violative of Section 8(a)(1). The Board determined that this finding of hostility was "bolstered" by Wheeler's remark to Runyon on May 12, 1959, that petitioner would "get rid" of the "one rat" who invited the Union in (see *supra*, p. 3), and by Hill's statement to Jacobson within a month after the election that "there's gong to be a lot of dead flies swept away" (see *supra*, p. 4) (P.A. 85a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order in full, holding that it was sustained by the evidence in the record as a whole and that its terms were valid and proper "under the circumstances of this case" (Pet. 1).

ARGUMENT

1. The first issue presented is whether substantial evidence supports the unfair labor practice findings of the Board. This issue does not warrant review by this Court. *General Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. In any event, the facts summarized in the Statement demonstrate that there is ample basis for the Board's findings.

Petitioner attempts to distill an issue of law from the Board's comment (P.A. 85a) that its conclusion respecting petitioner's hostility to the Union was "bolstered" by Wheeler's threat on May 12, 1959—seven days outside the six-month limitation period contained in Section 10(b) of the Act—to get rid of the "rat" who had invited the Union to organize petitioner's employees (Pet. 9–10, 12). The Board's conclusion that petitioner was hostile to the Union is amply justified without consideration of this incident. Moreover, the incident was not made the basis of an unfair labor practice finding, but used only as "background evidence." *Local Lodge 1424* v. *National Labor Relations Board*, 362 U.S. 411, 416, upon which petitioner relies, specifically recognizes that such

"earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." Accord, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705; *National Labor Relations Board* v. *General Shoe Corp.*, 192 F. 2d 504, 507 (C.A. 6), certiorari denied, 343 U.S. 904; *Paramount Cap Mfg. Co.* v. *National Labor Relations Board*, 260 F. 2d 109, 112–113 (C.A. 8); *Axelson Mfg. Co.*,[6] 88 NLRB 761.[7] Here, the earlier remark gave meaning to Wheeler's statement on August 14.

2. The Board in its order directed petitioner to refrain from unlawfully discouraging membership in the Union "or in other labor organization" by re-

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[6] The *Axelson* case is cited with approval in *Local Lodge 1424* v. *National Labor Relations Board*, *supra*, 362 U.S. at 416, note 6.

[7] There is no merit to petitioner's contention (Pet. 10) that the Board was foreclosed from considering Wheeler's threatening remarks to Kennedy on August 14, 1959 (see *supra*, pp. 3–4), because charges based on this conduct had been withdrawn by the Union with the Regional Director's consent. While the earlier charges contained an allegation of respondent's discrimination against Kennedy, an allegation which was not included in the charges that form the basis for the instant case (P.A. 1a–7a), the record does not show why the charges were withdrawn. Whatever the Union's reason, it was entitled to file new charges at a later time based on such information as was then at hand. And, when a Board investigation initiated by properly filed charges brings to light evidence of unfair labor practices, the Board is entitled to consider the party's entire course of conduct relative to the proscriptions of the Act. *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 253–255.

Equally insubstantial is the further contention (Pet. 12–13) that Wheeler's statement to Kennedy and Hill's remark to Arrington (see *supra*, pp. 3–4) were views and opinions protected by Section 8(c) of the Act. On their face, it is clear that both statements are more than mere expressions of views or opinion.

lieving its employees of any of their duties, threatening them, or "in any other manner" discriminating against them, or restraining them in the exercise of their organizational rights. In the circumstances of this case, such an order was within the Board's power, as the court below concluded. An employer who has engaged in violations of Section 8(a) (1) and (3) of the Act with respect to one union may be expected to oppose successor organizations with equal vigor. By the same token, employees whose rights have been invaded on one occasion in retaliation for their organizational activities should be assured of protection in the future, even though they choose a new labor organization. Furthermore, where an employer has resorted to a varied program of illegal action, violating two distinct provisions of the statute, and some of the misconduct "goes to the very heart of the Act" (*National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4))—the Board could properly find, as it did, that the employer would be likely to resort to additional types of unfair labor practices should there be other organizational activities in the future. This situation is distinguishable from that in *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, relied on by petitioner (Pet. 11–12), because the order there attempted to protect the rights of employees of employers not involved in the proceeding, and the nature of the misconduct, *i.e.*, violence in connection with a particular strike, was such that it could not fairly be assumed that the union would be likely to repeat it in the wholly dissimilar circumstances of other strikes against other employers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

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Assistant General Counsel,

MELVIN POLLACK,
Attorney,
National Labor Relations Board.

DECEMBER 1961.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> * * * * *
>
> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an

unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

SEC. 10 * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

MOTION FILED FEB 5 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

MOTION FOR RECONSIDERATION OF REHEARING AND APPENDIX

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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MOTION FOR RECONSIDERATION OF REHEARING

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully moves this Honorable Court to enter an Order, upon reconsideration, granting a rehearing of the above entitled case based upon the conflict entered in the Third Circuit wherein this action was commenced, by the decision of the Supreme Court of Pennsylvania in the case of *Lois and Michael Gershman, minors by Rhoda Gershman, their guardian, appellants, v. Metropolitan Life Ins. Co. and Dorothy Gershman,* 176 A.2d 435, 1962, a copy of which is appended hereto, and in support of this motion avers:

1. The la Orders of this Court in the above entitled action were entered on January 8, 1962; and since then the decision of the Pennsylvania Supreme Court in *Gershman v. Metropolitan Life Ins. Co., supra*, has been reported.

2. In the Gershman case, the two minor children of the decedent—insured by their mother as guardian sued unsuccessfully for the insurance proceeds, *on a written agreement*, as against their deceased father's second wife, the named beneficiary.

3. The fact situation therein is quite analogous to that of the above entitled proceeding; and those similarities plus other more compelling facts herein should lead, *a fortiori*, to the same result whereby your petitioner should prevail.

4. By the *written agreement in the Gershman case*, the minors' father had agreed with their mother that the children be named sole beneficiaries of the policies; but he never complied with the agreement and instead he made his second wife a co-beneficiary with the children. *In the instant case*, the mother of the decedent--insured's two children acting as their guardian claimed the insurance proceeds *under an alleged oral trust* whereby petitioner was claimed to receive the proceeds as trustee for the children; but the decedent never complied therewith, assuming its existence *arguendo*, because he instead irrevocably named your petitioner not only the sole beneficiary *in writing*, but also named him the *absolute owner, premium payer* and *possessor* of the policies.

5. *In the Gershman interpleader action*, the Court of Common Pleas No. 6, Philadelphia County, Joseph E.

Gold, P. J., held, and on appeal the Pennsylvania Supreme Court, Cohen, J., affirmed, that an agreement between the children's mother and the insured that the children were to be the sole beneficiaries was not supported by consideration and was not enforceable against the insured's second wife, who was named by the insured as co-beneficiary, where the children's mother and the insured had earlier concluded a property settlement and the sole reason for the consummation of the agreement was the mother's threat to contest the impending divorce proceedings unless the insured so agreed. *In the instant interpleader action*, the insured and the children's mother had earlier concluded a property settlement; and said mother-guardian never alleged in her Complaint for the insurance proceeds, and did not offer any testimony, that there was a consideration for your petitioner's alleged *oral agreement* to receive the insurance proceeds for the children instead of for himself individually, there being no consideration. Furthermore, the petitioner has claimed the insurance proceeds for himself absolutely under his *written contracts of insurance*, wherein he is named the sole beneficiary, *having denied the alleged oral trust* which is unproved and unproveable, and having established that there was not even ar attempt on the part of the respondents to show why he was paying the premiums for anyone other than himself. Thus *the alleged oral agreement* herein was not supported by consideration and was not enforceable against the insured's brother, petitioner herein. As a matter of fact and of record, the respondents herein did not even know that the contracts of insurance were still in full force and effect at the time of the death of the insured.

6. *In the Gershman interpleader action,* the Supreme Court of Pennsylvania held, therefore, that the decedent—insured did not intend to be legally bound so as to constitute legal consideration under the Uniform Written Obligations Act of May 13, 1927, P.L. 985, sec. 1, 33 P.S. sec. 6; and that "since the contract fails for lack of consideration, Gershman's children have no right to recover in this action of interpleader". *In the instant interpleader action,* it should have been determined that since the *alleged oral agreement* fails for lack of consideration, Ginsburg's children have no right to recover in this action of interpleader; and the petitioner's legal, *written contracts of insurance* must be respected and enforced.

Wherefore, petitioner respectfully prays that this Honorable Court will enter an Order recalling the records in the above entitled cause from the Office of the Clerk of the Arizona District Court at Phoenix; then, upon consideration thereof, *adjudicate the said issue of lack of consideration, which has not yet been passed upon in this proceeding;* and, thereupon grant the Petition for Writ of Certiorari.

Respectfully submitted,

PAUL GINSBURG,

Counsel for Petitioner.

APPENDIX

LOIS and MICHAEL GERSHMAN, minors by RHODA GERSHMAN, their guardian, appellants,
v.
METROPOLITAN LIFE INS. CO. and DOROTHY GERSHMAN

SUPREME COURT OF PENNSYLVANIA

January 2, 1962

Before Bell, C. J., and Jones, Cohen, Eagen, and Alpern, JJ.

COHEN, Justice.

This is an interpleader action wherein plaintiff-appellants, Lois and Michael Gershman, represented by their mother, Rhoda Gershman (first wife of the deceased, Benjamin Gershman) seek to obtain the proceeds of certain insurance policies on the life of Benjamin Gershman as against Benjamin's second wife, Dorothy the named beneficiary. Appellants claim the funds by virtue of an agreement between Rhoda and Benjamin made just two days before the scheduled master's hearing concerning Benjamin's divorce from Rhoda. By that agreement, Benjamin acceded to Rhoda's request that the children (appellants) be named sole beneficiaries of the policies. Benjamin, however, never complied with the agreement, but rather, made his second wife, Dorothy, a co-beneficiary with the children.

The insurance company paid the funds into court. The lower court determined that there was no consideration for the agreement and that the named beneficiaries were the rightful owners. The children have appealed.

Appellants claim that agreements of this sort are binding even as to innocent third persons. They rely on the case of *Hundertmark v. Hundertmark*, 372 Pa. 138, 93 A.2d 856 (1952), where the husband and wife agreed that the husband should continue the wife as beneficiary of certain life insurance policies after the divorce. However, the issue in the present case arises from the very point on which this case differs factually from Hundertmark. The agreement in Hundertmark was an integral part of the separation and property settlement agreement for which that court expressly held there was adequate consideration. Hundertmark, supra at 142, 93 A.2d 856. In the present case, the parties had concluded their property settlement agreement more than one month before the agreement concerned in this appeal, and the question involved is whether the subsequent agreement was supported by consideration.

The lower court held that the subsequent agreement was separate and independent of the earlier property settlement and could not stand because it was unsupported by consideration. Its reasons were: (1) the first wife relinquished no legal right in excess of a mere expectancy; (2) the subsequent agreement was not for the children's basic maintenance, required by law, which had been provided for adequately by the property settlement; and (3) the sole purpose for the consummation of the subsequent agreement was that Rhoda had threatened to contest the impending divorce proceedings unless Benjamin agreed to endorse the insurance policies over to the children as beneficiaries—therefore, any such consideration, being collusive in nature, is void as against public policy.

[1, 2] Appellants appeal only from the last of the three reasons set forth by the lower court. It is settled law, as noted by the lower court, that bona fide agreements relating to the adjustment of property rights between husband and wife, even though made in contemplation of a divorce, are upheld if they are not directly conducive to the procurement of a divorce. *Schmoker v. Schmoker,* 359 Pa. 272, 275, 59 A.2d 55 (1948. The agreement involved in Hundertmark was such a property settlement. The lower court here found, both as matters of fact and law, that the agreement, in contrast with the earlier settlement agreement, was directly conducive to the procurement of a divorce and, therefore, void as consideration.. From the record it is clear to us that the lower court's findings were supported by competent and sufficient evidence. Accordingly, we are of the opinion that there is no reversible error on this question.

[3] Appellants, however, raise the question of whether the words "Approved by", followed by the signature of Benjamin Gershman, on the letter constituting the agreement amounted to "an additional express statement, in any form of language, that the signer intends to be legaly bound," so as to constitute legal consideration under the Uniform Written Obligations Act of May 13, 1927, P.L. 985, § 1, 33 P.S. §6. We merely say, in response to this agreement, that we fail to see how the simple approval involved herein can be considered as an "additional express statement * * * to be legally bound."

[4] Since the contract fails for lack of consideration, Gershman's children have no right to recover in this action of interpleader.

Judgment affirmed.